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FILED
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 240

S. B. WRIGHT AND S. B. WRIGHT, AS ADMINISTRATOR OF THE ESTATE OF KATE S. WRIGHT, DECEASED,

Appellants,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

JAMES E. SHELTON,
W. C. SHELTON,
GEORGE W. BURCH, JR.,
Counsel for Appellee.

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IN THE SUPREME COURT OF THE UNITED STATES AND IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

4th Civil. No. 2445.

S. B. WRIGHT AND KATE S. WRIGHT,

vs.

Appellants,

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, NATIONAL BANKING ASSOCIATION,

Appellee.

STATEMENT OF APPELLEE DISCLOSING MATTERS MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, AND MOTION TO DISMISS PETITION OF THE APPELLANTS.

To the Supreme Court of the United States and the Honorable Chief Justice, and the Justices Thereof:

The appellee, Security-First National Bank of Los Angeles, respectfully submits the within statement, in support of the appellee's contention that the Supreme Court of the United States of America has no jurisdiction over the Petition for Appeal of the appellants, S. B. Wright and S. B. Wright, as administrator of the estate of Kate S. Wright, deceased, or jurisdiction over any of the matters therein

contained. Included in this Statement is a Motion to Dismiss the appeal of said appellants.

I.

On March 1, 1934, appellants and their associates James M. Oliver and Homer D. Crotty, as executor of the estate of A. J. Wheeler, deceased, were indebted to the appellee, Security-First National Bank of Los Angeles, for a large sum of money, to-wit: in excess of $200,000.00, said sum being the unpaid balance of a much larger sum borrowed by them over a period of ten years, for the development of a resort and land subdivision in the San Bernardino mountains, San Bernardino County, California, commonly called "WRIGHTWOOD".

This large indebtedness was evidenced by eight promissory notes, signed and delivered by the appellants and their associates to appellee (See misleading statement of opposing counsel, Page 3, Statement of Jurisdiction).

This indebtedness was secured by a "pledge" of the entire beneficial interest in and to that certain Trust owning all of the said Wrightwood property, executed by the makers of said notes. This Trust was known and designated as Trust No. D 7119 of the Security-First National Bank of Los Angeles, said Bank being named as Trustee, and appellants and their associates being designated as Trustor Beneficiaries. Said Trust was formerly known as Trust No. 4035 of the Pacific-Southwest Trust and Savings Bank, and also as Trust No. S S 4035 of the Los Angeles Trust & Savings Bank, both of which latter banks were predecessor trustees of said appellee, Security-First National Bank of Los Angeles, and to whose assets and trusts said appellee succeeded by consolidation and merger, with the full knowledge and consent of appellants and their associates who executed a supplemental declaration of trust on March 3, 1930, expressly acknowledging the continuance of said

trusts with the Security-First National Bank of Los Angeles, as Trustee (See misleading statement of opposing counsel, page 3 of Statement of Jurisdiction).

This Trust, D 7119, formerly S S 4035, the total beneficial interest of which was assigned and pledged to the appellee by the appellants and their associates, as security for the payment of said loans, was created on or about June 2, 1924, by the execution and delivery to Pacific-Southwest Trust and Savings Bank, predecessor trustee of the Security-First National Bank of Los Angeles, by appellants and their associate, Wheeler, of certain Grant Deeds for certain real properties situated in Swarthout Valley, and lying mostly in San Bernardino County, California.

Concurrently with the execution of said Grant Deeds to said Trust Company for said real property, the said Grantee, Pacific-Southwest Trust & Savings Bank, as Trustee, and the appellants and their associates, Wheeler and Oliver, as Trustor-Beneficiaries, executed the Declaration of Trust known and referred to as Declaration of Trust No. 4035, declaring that said properties, although conveyed by deed absolute, were nevertheless conveyed to, and received by, said Trust Company in trust for the purposes, with the powers, and on the terms and conditions set forth, and agreed to, in said Declaration of Trust.

There were thus several large parcels of real estate conveyed in trust to said trust Company by the trustor-beneficiaries. The Wright ranch, of approximately 1100 acres, title to which was vested in S. B. and Kate S. Wright as to a ⅔rds interest, and in Arthur J. Wheeler as to a one-third interest, was conveyed by said parties. The large Heath Ranch, held by Wheeler was also conveyed to the Trust Company. Although at that time James M. Oliver, now United States Commissioner for Yosemite National Park, became a beneficiary of the trust because he had "performed certain legal and other services in connection

with both the aforesaid properties", he at that time conveyed no property to the bank as part of the corpus of the trust.

The Declaration of Trust expressly declared that said beneficiaries intended to acquire other and additional properties in Swarthout Valley adjacent to the trust properties, and that as and when any of said properties were so acquired by any of the said beneficiaries they should be conveyed to the trustee subject to the terms of said trust. Summarizing said purpose, the Trust Declaration declared:

> "In order, therefore, to accomplish the agreed and declared purpose of all the beneficiaries to thus combine ownership of all the aforesaid properties heretofore acquired by any of the said beneficiaries or hereafter acquired by any of them, and to own, operate and dispose of same, as one property it is mutually agreed by all of said beneficiaries entitled to all the aforesaid properties now owned by the said beneficiaries or any of them in the aforesaid Swartout Valley or that may hereafter be owned by them or any of them as above set forth that said properties will be transferred and conveyed to the Trustee hereunder, and that when, as and if title is acquired by any of the beneficiaries hereunder to any of the aforesaid lands, *whatever interest and title is so obtained in and to any of said lands will forthwith be transferred and conveyed to the Trustee hereunder.*"

The Trust Declaration declared that the beneficiaries should own the following interests "*in the trusts and benefits herein and hereby created.*"

1. Sumner B. Wright and Kate S. Wright, husband, wife 26/42nds.

2. Arthur J. Wheeler, 10/42nds.

3. James M. Oliver, 6/42nds.

In 1930 a Supplemental Declaration of Trust was entered into by and between this Appellee Bank, and the appellants, S. B. Wright and his wife, Kate S. Wright, and their associates Wheeler and Oliver, by the terms of which the Bank acknowledged that there had been conveyed to it or its predecessor Trustee in trust for said beneficiaries by the Sierra Nevada Live Stock Company some additional 2015.99 acres of land in Swarthout Valley, and by James M. Oliver and wife, an additional 80 acres of land, and by Mr. and Mrs. Wright a 50 foot easement or right-of-way.

The parties agreed that said properties should be held subject to all the terms and conditions of said previous Declaration of Trust S S 4035.

In this Supplemental Declaration of Trust the beneficiaries altered their proportionate ownership of the beneficial interests in said Trust as follows:

1. Sumner B. Wright and Kate S. Wright from 26/42nds to 19/42nds
2. Arthur J. Wheeler from 10/42nds to 5.5/42nds
3. James M. Oliver from 6/42nds to 13.5/42nds

In the said Supplemental Declaration of Trust the beneficiaries expressly acknowledged that they had borrowed money from the bank and "have pledged their beneficial interest in Trust S S 4035 as security therefor."

The intent and purpose of the appellants and their associates to create an express trust in real property, and to convert their respective interests in the trust real estate into personal property beneficial interests is made manifest to the point of demonstration, not only by the above stated transactions, but by all the terms and conditions of the Trust Declaration.

Under Article I, upon death, the estate of any deceased partner would have no interest in the land, but only an interest in the trust.

Article VI vests the trustee with power to—

1, Rent; 2, Lease; 3, Sell; 4, Convey.

Article VIII gives trustee exclusive power to execute all agreements, deeds and other necessary documents.

Article XII makes the beneficiaries or their agent the agents for the trust to sell the property.

Article XII also outlines the extensive plans to acquire all of Swarthout Valley for the trust and then to have the trustee sell it.

Article XIV. The Trustee *shall* except as provided in Article XII, collect and receive all proceeds and disburse same.

Article XVI provides that the interest of the heirs shall be in their beneficial interest in the trust, not in the property itself.

It also provided for the assignment of the beneficial interests in the trust to others, and when it would be binding on the Trustee.

Article XVIII. Arranges for care of inheritance or income taxes assessable against the beneficial interest of the beneficiaries, showing beneficiaries intended their sole interest to be in the trust, not in the land. Provides for sale if necessary, of part of beneficial interest to pay these taxes.

Article XIX provides for assessments pro rata against beneficiaries for trust expenses and for foreclosure of their beneficial interest if not paid. The beneficiaries assign these interests to Bank to enable proper conveyance to be made.

Article XX contains a clear, unambiguous declaration of the trustors' intent and purpose to effect a conversion.

Lest there be any misunderstanding of the intention of the parties to the Declaration of Trust, a conversion of

their real property interests into personal property beneficial interests, they declared in paragraph XX of the Trust Declaration as follows:

> "It is distinctly understood that the interest of each beneficiary hereunder is personal property and that no such beneficiary has any right, title or interest in or to the property covered hereby, and has no right or power to in any manner apply for or secure the dissolution or termination of this trust, or the partition or division of any of the trust property; the sole right and power of each beneficiary hereunder being to enforce the performance of the terms of this trust as expressly set forth in this Declaration of Trust."
>
> "Provided, however, that after the payment in full of the indebtedness secured hereby, if any, and the termination of the agency, appointment, or appointments, if any, made in accordance with the terms of this trust, the beneficiaries of this trust by a written direction of a majority in number (and not in interest) may close and terminate this trust."

II.

After having extended "every courtesy consistent with good banking" as appellant, S. B. Wright, stated in a letter to the Bank's counsel, the Appellee, on March 1, 1934, brought suit, in the Superior Court of the State of California, in and for the county of Los Angeles, Action No. 370-962, against the appellants, and their co-makers of said notes, to recover judgment thereon, and to foreclose the pledge of the beneficial interests in said Trust No. D 7119, assigned and pledged to it by the said beneficiaries as security for said indebtedness, and to have sold the said beneficial interests in the manner prescribed by the California Statutes and procedure for the sale of pledged personal property. In this action the appellee asked the court to foreclose and to order sold in the manner provided by law for the sale of pledged personal property, by a Com-

missioner appointed by the court the total beneficial interest in and to said Trust No. D 7119, as a pledge of personal property.

The appellant, S. B. Wright, appeared in said action and disclaimed, his interest having been previously assigned to his wife. Kate S. Wright defaulted said action, as did her co-defendants, except Homer D. Crotty, who as executor of the estate of A. J. Wheeler then deceased, appeared and answered through counsel, and prayed that formal proof of the allegations of the complaint be required.

On May 28, 1934, judgment was rendered in favor of Security-First National Bank of Los Angeles, and against the makers of said notes, for the sum of $220,842.34. Said judgment decreed that the entire beneficial interest in said Trust No. D 7119 was personal property and had been pledged for the payment of said indebtedness, and ordered that said beneficial interest be sold at public auction, in the manner provided by the California Statutes and procedure, to-wit: Section 3005 Civil Code and Section 692 of Code of Civil Procedure, by a Commissioner appointed by said court, and that any party to said action could become a bidder at said sale and that the defendants and each of them be foreclosed of all their several interests in and to said beneficial interest in and to said Trust No. D 7119.

Pursuant to the said judgment, the Court's Commissioner sold at public auction the entire beneficial interest in said Trust No. D 7119 of said Security-First National Bank of Los Angeles for the sum of $217,112.18, said bank being the highest and best bidder. The bank went immediately into possession of all the property in the said Trust D 7119, as its own property, and has remained in possession thereof ever since.

Before the foreclosure judgment became final, Kate S. Wright and S. B. Wright appealed from said Judgment to the Supreme Court of the State of California.

During the pendency of this appeal, appellant S. B. Wright, who at all times according to his wife, Kate S. Wright, represented her, joined with one Richardson, a tenant at Wrightwood, in a conspiracy to cloud the titles to the real property then owned by the bank, formerly the corpus of Trust D 7119, by placing on the record a deed purporting to convey to Richardson's company the same right of way which he had previously conveyed to the bank and which was acknowledged in the Supplemental Declaration of Trust. The object of these activities was to force the bank to give Richardson a contract which he desired to operate a store at Wrightwood and to get something out of the bank for himself.

Wright's attorney, Butler, became Richardson's attorney also in this scheme. He approached the bank on behalf of Richardson and Wright, seeking a settlement. A settlement with S. B. Wright and his wife was finally arranged. Wright testified that he consulted two other attorneys as well as his attorney, Butler, before executing the agreement.

The Agreement is as follows:

> "This Agreement, made and entered into this 30th day of April, 1935, by and between S. B. Wright and Kate S. Wright, his wife, hereinafter called First Parties, and Security-First National Bank of Los Angeles, a National Banking Association, hereinafter called Second Party, WITNESSETH:
>
> *Recitals:* Party of the second part obtained a judgment against the parties of the first part in the Superior Court of the State of California, in and for the County of Los Angeles, in an action numbered 370-962, reference to which is hereby made. Said judgment has been appealed to the Supreme Court by parties of the first part, and is now pending therein under number L. A. 14982, reference to which is hereby made. Other controversies between said parties exist.

The respective parties hereto are desirous of finally compromising, settling and adjusting all outstanding controversies between them, hence this agreement:

The Agreement: Parties of the first part, in consideration of the sum of fifty dollars ($50.00) to them in hand paid, the receipt of which is hereby acknowledged, and other good and valuable consideration, do hereby release and discharge the party of the second part from any and all claims, and demands of any nature or kind, which they, and each of them, may have, or claim to have, against said party of the second part.

The parties of the first part, in consideration of the said payment, and in consideration of the covenants of the said party of the second part, as hereinafter provided, do hereby waive all right of appeal from the above mentioned judgment in said Superior Court case No. 370-962, and do hereby covenant and agree to dismiss, or cause to be dismissed, forthwith, the pending appeal from said judgment, or if the said decision be reversed before said dismissal is entered, to stipulate that judgment as originally entered in said action be entered or affirmed.

In consideration of the above mentioned payment, and other good and valuable consideration, the said parties of the first part do hereby waive any and all claim in and to any property, real and personal, a part of the corpus of Trust No. D 7119 of the Security-First National Bank of Los Angeles, reference to which is hereby made, and to any interest in and to the beneficial interest of said trust, and also do hereby transfer and convey, remise, release and forever quitclaim unto said party of the second part all of their right, title and interest, if any, in and to the said property, and in and to any reservations, conditions, easements, rights of way or other interest in anywise affecting the title or possession of said real property.

It is the intention of parties of the first part hereby to quitclaim, and they do hereby quitclaim to said second party, any and all of their right, title and interest, if any, in and to the property, a part of the

corpus of said Trust No. D 7119, reference to which is hereby made, and to any and all rights of way, easements, and appurtenances, in, on, over or across the properties in said Trust No. D 7119.

In consideration of the foregoing conveyance, release and discharge, the party of the second part agrees to pay to parties of the first part, immediately upon the dismissal of said appeal from the above-mentioned judgment, or upon the affirmance of said judgment, or upon the final determination of said litigation, as above provided, the further sum of Two Hundred Fifty Dollars ($250.00).

Likewise, subject to the said condition regarding the dismissal of said appeal, or affirmance of said judgment, or final determination of said litigation, the party of the second part agrees to release and discharge the parties of the first part from any and all claims and demands which it may have, or claim to have, against said parties of the first part; provided, however, that said release shall not include any claims or demands which it may have as trustee for any other person, firm or corporation, in any other trust than said Trust D 7119.

Each of the respective parties herein do hereby agree to execute and deliver on demand such conveyance, deeds and/or other documents as may be necessary to make effective the terms of this agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands as of the date hereinabove set forth.

S. B. WRIGHT,
KATE S. WRIGHT,
Parties of the first part.

[SEAL.] SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
By W. B. STRINGFELLOW, *Vice-President,*
Party of the second part.
By A. B. NORDLING, *Asst. Vice-President.*"

After the execution of this agreement the Appeal from the Los Angeles County Superior Court Action was dismissed, and the said bank paid the sum of $300.00 to Kate S. and S. B. Wright. By the agreement the bank also released the unpaid balance of its obligation owed by appellants amounting to approximately $5,000.00. It also gave Richardson the agreement he and Wright wished.

III.

Notwithstanding this final compromise and settlement, the appellants, Kate S. Wright and S. B. Wright, on the 30th day of October, 1936, filed the instant action in the Superior Court of the State of California in and for the County of San Bernardino, against the Security-First National Bank of Los Angeles to eject it from, and recover possession of a portion of the properties formerly in said Trust No. D 7119, and known generally as the "Wright Ranch Properties". No offer was ever made to pay the bank's debt, or to do equity.

The bank answered said action, denying appellants' claim of right to possession, and pleading in bar:

A. That the Foreclosure Judgment in Case No. 370-962 was *res judicata* as to every issue in the instant case, and hence a bar thereto.

B. That by their Settlement Agreement, and Quitclaim, the appellants were estopped and barred from the relief sought.

On the trial of the action appellants admitted that the foreclosure decree in the Superior Court of Los Angeles County was a final judgment and was "*res judicata*" as to the foreclosure of the beneficial interests in said Trust, but contended that the deeds of the real property to said

Trustee created a mortgage only and that the appellee's interests in the Trust real estate had not been converted by the deeds and declaration of Trust into personal property beneficial interests. Hence, appellants claimed the decree of the Los Angeles County Superior Court foreclosing such interests as a pledge, did not adjudicate the question of conversion, and was not *res adjudicata* in the instant action.

To the second issue raised by the settlement agreement, they pleaded and attempted to prove fraud in the execution of the agreement and quitclaim.

The Bank, in said action, contended that the parties to the trust had, in accordance with the statutes and decisions of the State of California, created a trust in which the trustor-beneficiaries converted their real property interests into personal property beneficial interests in the trust, in accordance with their expressed intent and purpose as disclosed by the Declaration of Trust. That said trustor-beneficiaries had, over a period of ten years, borrowed large sums of money from the said Bank and its predecessors in interest upon the "pledge" to it of said beneficial interests. That the issue of the construction of said deeds and Declaration of Trust was before the Superior Court of Los Angeles County on the foreclosure action, and that its decree finding that such beneficial interests were personal property and were pledged as security for the Bank's debt, was *res adjudicata,* in the instant action.

The Bank met the issue of fraud in the execution of said Settlement Agreement and quitclaim with ample evidence. To show its good faith, the Bank offered in open court to sell and reconvey to appellants the entire trust property upon payment of the amount the bank actually had in the property, without interest. This offer was rejected.

The court, after full trial and consideration of the evidence, found and rendered judgment—

A. That the Trustor-Beneficiaries of said Trust D 7119 had intended to and did convert their interest in the Trust real estate into personal property beneficial interests which were pledged to the bank as security for its indebtedness.

B. That the decision of the Los Angeles Superior Court was *res adjudicata* in the instant case and barred the action of appellants.

C. That the Settlement Agreement containing the quitclaim deed was not obtained by fraud and was a valid contract and barred the action of appellants.

D. That at no time had the appellants offered to pay the Bank's indebtedness or to do equity.

IV.

From the said judgment of the Superior Court of San Bernardino County Kate S. Wright and S. B. Wright appealed to the Supreme Court of the State of California, which court, in the exercise of its authority and jurisdiction under the Constitution of the State of California, transferred the appeal to the District Court of Appeal, Fourth Appellate District of the State of California for decision, determination and judgment of said cause and appeal.

The said District Court of Appeal, Fourth Appellate District, on October 23, 1939, affirmed the judgment rendered by the trial court of San Bernardino County, California (Vol. 99 California Appellate Decisions, page 254). That a true and correct copy of the judgment of said court is annexed to, and made a part of this Statement, marked Exhibit "A".

The appellants, Kate S. Wright and S. B. Wright, filed a

petition with the Supreme Court of the State of California for a hearing after decision of the District Court of Appeals, Fourth District. The Supreme Court, on December 21, 1939, denied said petition.

V.

No Federal question is raised by the petition. No contention was made by the appellants on the trial or before the Fourth District Court of Appeals that the Grant Deed under which title to the corpus of the trust was conveyed to the Bank, as Trustee of said Trust, and the Declaration of Trust by which their interests therein were converted into personal property beneficial interests in the trust, in anywise violated the 14th Amendment to the Constitution of the United States of America, or any other provision of the Federal Constitution. Therefore, this Court is without jurisdiction under the decisions and rules of this Court.

Lynch v. *New York*, 293 U. S. 52, 53, 79 L. Ed. 191, 192, 55 S. Ct. 16 and cases cited there;

Missouri, ex rel. Missouri Inc. Co. v. *Gehner*, 281 U. S. 313, 320, 50 S. Ct. 326, 74 L. Ed. 870;

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360.

VI.

That no Federal question is raised by the petition in that the decision of the Fourth District Court of Appeals in determining that the judgment of the Superior Court of Los Angeles County was *res judicata* under the decisions of the California courts, as to all matters raised by the appellants in the instant case, did not rest on any ground involving a Federal question, but dealt solely with the finality of judgments under the decisions of the State of California.

Kenney v. *Craven*, 215 U. S. 125, 30 S. Ct. 64, 54 L. Ed. 122.

VII.

No Federal question is raised by the petition, in that the decision of the District Court of Appeals, Fourth Appellate District, is further based upon the validity of an express written compromise and settlement agreement with a quitclaim deed provision therein executed between the Bank and appellants to settle all controversies and claims of appellants in and to the property involved in the instant action and in which the appellants waived any further claim thereto and quitclaimed any title they might have therein to the Bank. The determination of the validity of such compromise contract under the laws of the State of California, involved no possible violation of the contract clause of the Federal Constitution, nor any other clause thereunder. Appellants have had a fair trial on every issue raised by them as to the validity of said contract.

Kenney v. *Craven*, 215 U. S. 125, 30 Sp. Ct. 64, 54 L. Ed. 122;

Broad River Power Co. v. *State of South Carolina*, 281 U. S. 313, 74 L. Ed. 1023.

VIII.

No Federal question is raised by the petition, in that the construction of the Declaration of Trust by the trial court and the District Court of Appeal as to whether an equitable conversion of the appellants real estate interests in the trust property into personal property beneficial interests in the trust was effected, involved solely a local question under the laws and decisions of the State of California. That it was correctly decided is shown by the following statutes and decisions:

Sections 2220, 2221, 2222, 2254 of the Civil Code of California.

Section 852 Code of Civil Procedure of California.

Sections 1636, 1641, 1642, 1643, 1649, 3512, 3513, 3520, 3535, 3541, of the Civil Code of California.
Section 2924 of the Civil Code.
Cardoza v. *White*, 219 Cal. 474 (27 Pac. (2d) 639).
Renton v. *Gibson*, 148 Cal. 650 (84 Pac. 186).
Katz v. *Zurich Gen. & A. L. Ins. Co.*, 212 Cal. 576 at 582.
McNeny v. *Touchstone*, 7 Cal. 2nd. 429 at 435 (1936).
Smith v. *Bank of America*, 14 Cal. App. (2d) 78 (57 Pac. 2d, 1363).
Bank of America v. *Sparr*, 20 Cal. App. 2d 102; (66 Pac. 2d 476).
Houghton v. *Pac. S. W. Tr. & S. Bank*, 111 Cal. App. 509.
Finnie v. *Smith*, 83 Cal. App. 707.
Cravens v. *Dominguez Estate Co.*, 72 Cal. App. 713.
Ward v. Waterman, 85 Cal. 488.
Faries v. *Title Ins. & Trust Co.*, 15 Cal. App. 2nd 350.
Wright v. *Security-First National Bank of Los Angeles*, 99 Cal. App. Dec. 254.
Title Insurance & Trust Co. v. *Duffill*, 191 Cal. 628.
Duncannon v. *Lill*, 322 Ill. 528 (153 N. E. 618).
Chicago Title & Trust Co. v. *Mercantile Trust & Savings Bank et al.*, 300 Ill. App. 329 (20 N. E. 2d) 992.

IX.

The Supreme Court is without jurisdiction in this appeal in that the Decision of the District Court of Appeal, Fourth District, is based on a rule of property established by the legislative enactments and decisions of the highest courts of the State of California.

Edward Hines Yellow Pine Trustees, v. *Martin*, 268 U. S. 458; 45 S. Ct. 573; 69 L. Ed. 1050.
Laugharn v. *Bank of America*, 88 F. (2d) 551.
Erie Railroad v. *Tompkins*, 82 L. Ed. 878.

X.

The Supreme Court of the United States is without jurisdiction in the instant case to review questions of fact raised by the petition, but is bound to accept the conclusions of the State tribunal as final.

Christmun v. *Miller* (Cal. 1905), 107 U. S. 313, 25 S. Ct. 468, 49 L. Ed. 770 (A Chancery case).

XI.

That the Supreme Court is without jurisdiction in the instant case for the reason that neither the petition nor statement of the appellants contains the jurisdictional requirements as laid down by Rule 12 of the United States Supreme Court rules in the following particulars:

First, that the statement does not specify the stages in the proceedings of the Superior Court of San Bernardino County, or in the Fourth District Court of Appeals, at which, and the manner in which, the Federal questions sought to be reviewed were raised, or the method of raising them;

Second, that the statement does not specify the way in which the Federal question was passed on by the trial or appellate court;

Third, that the statement does not contain a copy of the decision of the District Court of Appeal, or pertinent quotations of specific portions thereof, or any quotation from the record showing where any Federal question complained of was raised in the trial, or on said appeal sufficient to support the assertion of the appellants that the rulings of the California trial and Appellate Courts were of a nature to bring the case within the provisions of Article I, Section 10, and the 14th Amendment of the Constitution of the United States, and thus confer jurisdiction on the United States Supreme Court.

XI.

The appellee, Security-First National Bank of Los Angeles, hereby moves the above entitled court to dismiss the Petition for Appeal filed herein, on the ground that no Federal question is stated in said petition and its accompanying statement, and that no Federal question was involved in the trial of the said action, or in the decision of the District Court of Appeal affirming the decision of said trial court.

Said motion will be based upon the Petition for Appeal, and Statement of Appellants filed herein, upon appellee's answer thereto and upon the records and files in this case.

WHEREFORE, appellee prays that the petition for appeal be denied and that the same be dismissed by this Court with costs.

Dated February 9, 1940.

Respectfully submitted,

JAMES E. SHELTON,
W. C. SHELTON,
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Security-First National Bank of Los Angeles.

EXHIBIT "A".

IN THE DISTRICT COURT OF APPEAL IN AND FOR THE FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

Civil No. 2445

Opinion.

A. B. WRIGHT and KATE S. WRIGHT, *Plaintiffs and Appellants*

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association, *Defendant and Respondent.*

Appeal from a judgment of the Superior Court of San Bernardino County, Benjamin F. Warmer, Judge. Affirmed.

For Appellants—Morris Lavine.
For Respondent—W. C. Shelton and George W. Burch, Jr.

This is an action in ejectment involving the title and right of possession of about 1100 acres of land in the San Bernardino mountains. Kate S. Wright having died pending the appeal, the administrator of her estate has been substituted as one of the appellants. For brevity, we will refer to the original appellants and to the respondent bank, although some of the earlier transactions involved were had with its predecessor, the Pacific Southwest Trust and Savings Bank.

Prior to June, 1924, the appellants owned the land in question subject to a $60,000 mortgage in favor of the respondent. They conveyed a one-third interest in this land to one A. J. Wheeler subject to this mortgage. Wheeler owned an adjoining tract of land known as the Heath Ranch, which was also subject to a mortgage. In 1924, the appellants and Wheeler, in association with one James M. Oliver, entered into an arrangement to combine the Wright Ranch

and the Heath Ranch, and any adjoining lands that might thereafter be acquired by any of the parties, for the purpose of developing a resort and land subdivision to be known as Wrightwood. To this end the appellants and Wheeler conveyed their respective lands to the respondent and, on June 2, 1924, a trust agreement was executed between the four parties above named, as beneficiaries, and the respondent as trustee and the respondent's banking department as payee.

This trust agreement is quite lengthy and only a portion thereof need be referred to. It recites that the above-mentioned properties have been conveyed to the respondent subject to the mortgages; that Oliver had performed certain services in connection with both of the properties; that the Wrights are entitled to 26/42nds, Wheeler to 10/42nds, and Oliver to 6/42nds, "interest in the trusts and benefits herein and hereby created"; that the beneficiaries will from time to time borrow further amounts from the payee; that the beneficiaries have mutually agreed that it is for the best interests of all concerned that both properties and any adjoining properties subsequently acquired should be owned, operated, improved and disposed of as one property; that in order to carry out this purpose "to thus combine ownership of all the aforesaid properties * * * and to own, operate and dispose of same as one property" it is agreed that any adjoining property thereafter acquired by any of the beneficiaries shall be conveyed to the trustee; that the trustee paid no consideration for the lands conveyed and to be conveyed; that the conveyances made and to be made were and will be received by the trustee primarily as security for the payment of the Wright mortgage and subsequent advances and for the further "purposes of holding, operating, leasing, selling and conveying said properties," and applying and disposing of the proceeds therefrom, in accordance with the terms of the trust.

The trust agreement then contains twenty-five articles setting forth further agreements of the parties. Among other things, the beneficiaries agree to pay all existing and future encumbrances, all taxes, liens and expenses, and pay for all improvements contracted for or ordered by them. If any improvements promised by the beneficiaries

to purchasers of lots are not installed or paid for, the trustee is authorized to install and pay for the same and be reimbursed therefor. The beneficiaries are authorized, with the approval of the trustee, to subdivide any portion of the land and the trustee is to subscribe necessary maps and dedicate to public use appropriate streets and alleys and to make conveyance to purchasers of any lots sold when they are entitled thereto. The trustee is to rent, lease, sell or convey the property or any portion thereof to such persons and at such prices and terms as the beneficiaries or their agent may direct, subject to the approval of the trustee. The agreement recites that the beneficiaries have entered into a written agreement with a sales agent for the subdivision of the first unit of the property and the trustee is to execute contracts of sale upon demand of said agent. Provision is made for further agency contracts in connection with the subdivision of further units of the property. The trustee is to receive and collect all proceeds arising from leases and sales of the trust property and dispose of them in a designated manner. In the event the interest of any beneficiary is assigned or passes by reason of his death the trustee shall hold said interest for and shall distribute the proceeds to the one entitled thereto. Article XX of the trust agreement contains the following:

> "It is distinctly understood that the interest under this trust of each beneficiary hereunder is personal property and that no such beneficiary has any right, title or interest in or to the property covered hereby, and has no right or power to in any manner apply for or secure the dissolution of termination of this trust, or the partition or the division of any of the trust property; the sole right and power of each beneficiary hereunder being to enforce the performance of the terms of this trust, as expressly set forth in this declaration of trust.
>
> "Provided, however, that after the payment in full of the indebtedness secured hereby, if any, and the termination of the agency appointment or appointments, if any, made in accordance with the terms of this trust, the beneficiaries of this trust by a written direction of

a majority in number (and not in interest), may close and terminate this trust."

The original mortgage for $60,000 given by the appellants to the respondent was subsequently paid and released. As contemplated by the trust agreement and in connection with the development of Wrightwood, the respondent advanced large sums of money to the beneficiaries. In 1928 these advances amounted to $197,331.23 and the four beneficiaries executed a note for that amount to the respondent, which note recited that each beneficiary pledged to the respondent as collateral security for the payment of the note "all my right, title and interest in and to" this declaration of trust "and also all my right, title and interest in and to the proceeds and avails thereof." The note also provided that the respondent might sell the pledged property at public or private sale, as it might see fit. In the next few years the four beneficiaries executed seven other notes in various amounts, containing the same provisions. The principal of these notes totaled $263,331.23. Certain amounts were paid thereon, so that in 1934, the total indebtedness amounted to approximately $220,000.

On March 15, 1934, the respondent brought an action in the Superior Court of Los Angeles County against the appellants, the other signers of these notes, and certain subsequent pledgees of the beneficial interests in the trust. The complaint was labeled "Action to Foreclose a Pledge." Among other things, the complaint alleged that the signers of the various notes had pledged their "entire beneficial interest" in and to the trust here in question as security for the payment of the notes and that the notes provided that said pledge was made upon the agreement that in the event the indebtedness was not paid as agreed the respondent should have the right to sell the pledged beneficial interests in this trust "as personal property." Among other things, it was prayed that each of the defendants be foreclosed of all "right, interest, claim, lien and/or equity in or to the pledged property to wit, the beneficial interest in and to" the declaration of trust here in question "together with the property therein described." It was then prayed that the pledged property be sold in the manner

provided by law for the sale of pledged personal property in a court action. The appellants were served and filed an appearance in that action but filed no answer. The court found, among other things, that the entire beneficial interest in this trust "is personal property and it was duly pledged as personal property to secure the respective indebtedness of the defendants." Judgment was entered for approximately $221,000 and a commissioner was appointed to sell all of the property mentioned in the complaint in the manner provided for the sale of pledged personal property. The commissioner reported to the court that he had sold the property to the respondent for about $217,000 and that the balance still due and owing on the judgment was $4,500.

The appellants in this action filed notice of appeal from the judgment and decree in the Los Angeles action. Subsequently, the appellants and respondent in this action entered into a written agreement whereby the respondent agreed to pay to the appellants the sum of $300 and to release the appellants from any and all claims and demands it had against them, and the appellants agreed in consideration thereof and of "other good and valuable consideration" to release and discharge the respondent "from any and all claims, and demands of any nature or kind," to dismiss their appeal in the Los Angeles action, to "waive any and all claim in and to any property, real and personal, a part of the corpus" of the trust here in question and "also do hereby transfer and convey, remise, release and forever quitclaim unto" the respondent "all of their right, title and interest, if any, in and to the said property, and in and to any reservations, conditions, easements, rights of way or other interest in anywise affecting the title or possession of said property." The agreement then proceeds: "It is the intention of the parties of the first part to quitclaim, and they do hereby quitclaim to said second party, any and all of their right, title and interest, if any, in and to the property, a part of the corpus of" the trust here in question. After the execution of this agreement the appeal in the Los Angeles action was dismissed, the respondent entered into possession of the land, and the respondent paid the $300 to the appellants and also executed a contract to a third party for

another purpose, the appellants having been trying to assist said third party in obtaining such a contract.

About a year and a half later the appellants brought this action in ejectment. The complaint alleged that at all times since June 2, 1924, the appellants have been "seized in fee of said real property," and that they were in possession until June 1, 1934, at which time the respondent wilfully and unlawfully entered upon the property and ousted and ejected them. An amended complaint in ejectment was filed alleging the same things and containing a second cause of action in which it was alleged that the above-mentioned agreement, by the terms of which the appellants agreed to dismiss the appeal in the Los Angeles action and to quitclaim to the respondent the lands included in the corpus of the trust, was obtained by fraud and misrepresentations and that the appellants intended thereby to agree to dismiss the other action but did not intend to quitclaim their interest in the lands conveyed in trust and did not know that such a quitclaim provision was included therein. The respondent answered denying the allegations of the amended complaint and setting up various defenses, among which were that the action was barred and the appellants estopped by the final judgment in the Los Angeles action and by the quitclaim provisions of the agreement, and that the appellants were estopped by their grant deed, the declaration of trust and the assignment and pledge of their entire beneficial interests in the trust. The court found in all respects in favor of the respondent, finding upon ample evidence that there had been no fraud or misrepresentations in connection with the execution of the settlement agreement through which the appeal in the former action was dismissed and the property quitclaimed to the respondent. It was further found that under the trust agreement the beneficial interest of each beneficiary was personal property and that no beneficiary had any right, title or interest in and to the property conveyed in trust; that the appellants had pledged their entire beneficial interests in the trust as well as in the proceeds and avails thereof as a pledge of personal property; that the property so pledged was sold pursuant to the decree in the Los Angeles action, by virtue of which the respondent became the owner of all of the

real property; that at no time since said sale had the appellants offered to pay the amount due or to do equity; that the appellants had executed an agreement quitclaiming and conveying to the respondent any and all interest they might have in and to the property; that at the time said agreement was executed the said appellants were represented by three attorneys, each of whom advised them to execute the agreement; that by reason of the judgment entered in the Los Angeles action the appellants are barred and estopped from maintaining this action; that the compromise agreement and quitclaim is in full force and effect, has never been rescinded and was not obtained by any fraud whatever; and that by reason of said quitclaim the appellants are barred and estopped from maintaining this action. A judgment was entered in favor of the respondent and this appeal followed.

The appellants contend that the conveyance of this property in trust to the respondent was an equitable mortgage, relying upon Sacramento Bank *v.* Alcorn, 121 Cal. 379. In that case, it was pointed out that where the effort to create a trust failed it would seem to follow that the instrument was a mortgage. It is next argued that since this was a mortgage the appellants, as mortgagors, have the right of possession until that right is divested as provided for in the case of real property, citing Bank of Italy *v.* Bentley, 217 Cal. 644, which case involved an ordinary trust deed. It is then contended that the appellants, as trustors, occupied the dual position of beneficiaries under the trust and of mortgagors under an equitable mortgage, that these two interests were entirely separate and distinct, and that their interest as mortgagors was unaffected by their pledge and assignment of their beneficial interest in the trust, by the subsequent sale under that pledge, and by the judgment in the other action. In this connection it is argued that the appellants believed, and had a right to believe, that by the foreclosure and sale of their beneficial interest in the trust "they would be protected in their ownership of the real estate which they had deeded to the bank as a security; that the notes to secure which the deeds were made would be paid and satisfied; that their property would revert to them free and clear." It is further contended that the right of possession of the real

property was not involved in the Los Angeles action, that the judgment therein has no effect in this action, and that the quitclaim given to the respondent is null and void because the respondent failed to prove that it paid the appellants the full value of their equity.

The first question naturally suggested is whether the interest of the appellants, as trustors, in the real property thus conveyed in trust was personal property or whether they retained an interest in real property which could only be divested as such. While it is well settled that the grantor in an ordinary trust deed given to secure a debt retains an interest in the real property it is also well recognized that a different situation may exist where property is conveyed under certain trust provisions and for other purposes. It has been held that whether such trust property is to be considered as personalty or as an interest in real estate depends upon the intention of the parties and, in various cases, certain things have been held sufficient evidence of an intention to convert an interest in real property into one in personal property.

The appellants argue that Janes *v.* Throckmorton, 57 Cal. 368; Title Ins. & Trust Co. *v.* Duffill, 191 Cal. 629, and Lynch *v.* Cunningham, 131 Cal. App. 164, are controlling in the instant case upon this question. In the Janes case land was conveyed to another in trust with directions to sell within three years enough of the land to pay the grantor's debts and then to reconvey to him a part of the remainder. The court pointed out that it was manifestly the hope and intention of the grantor to pay the debts by selling a part of the land and to retain the remainder, and held that he retained an interest in the land. In the Duffill case it was held that a trust created by a certain will gave a present rather than a future interest in real property to a beneficiary. The trust was to continue until a certain person reached, or would have reached, if he had lived, the age of 21 years. In the Lynch case the property was conveyed to a trustee to manage and pay over the income to the beneficiaries for a period of 20 years, the property then to be reconveyed.

The respondent relies on Ward *v.* Waterman, 85 Cal. 488; Craven *v.* Dominguez Estate Co., 72 Cal. App. 713; Finnie *v.* Smith, 83 Cal. App. 707; Houghton *v.* Pacific Southwest

T. & S. Bk., 111 Cal. App. 509; Smith *v.* Bank of America etc. Assn., 14 Cal. App. (2d) 78; Bank of America Assn. *v.* Sparr R. Corp., 20 Cal. App. (2d) 10. These cases all involve subdivision and sale trusts and in each case it was held that the grantor had retained no interest in the real property but as beneficiary owned merely an interest in the proceeds from the sale of the property, which interest was to be considered as one in personal property.

The appellants argue that the cases last cited constitute the only exception to the rules established by the cases relied upon by them and that the subdivision trust cases establish the rule that in order to change an interest in land conveyed to such a trust into an interest in personal property it must be mandatory, under the trust agreement, for the trustee to sell all of the real property in any event, and there must be no power of termination of the trust or contingency upon which any part of the land may be returned to the grantor. Some of these cases contain language tending to support this contention. For example, in Bank of America *v.* Sparr R. Corp., *supra*, it is said: "In both the Cunningham and the Duffill cases the reconveyance of the *corpus* appeared to be within the contemplation of the parties involved in the transaction. In the case at bar that intention appears to us to be entirely absent. Not a single one of the trusts indicates any contemplation that the real property should ever be returned or reconveyed to the beneficiary; that the interests of the beneficiary consisted solely in what the surplus might be." However, the court had just pointed out that in both of those cases the rights of third parties were being considered and not merely the intention of the parties to the trust. The appellants' statement that not one of the above cited subdivision cases involved a trust agreement which permitted any part of the land to be returned to the trustor is not quite true. In Smith *v.* Bank of America etc. Assn., *supra*, the trust agreement provided that the trust might be closed by the conveyance of any unsold portions of the property to the beneficiaries, but it further provided that the interest of each beneficiary was personal property and not an interest in the property conveyed to the trust. Although the interest of a creditor was being considered, it was held that the

beneficiaries had no interest in the real property. In that case, the court said: "Appellant goes to some length to differentiate between the 'title' to the property and the 'estate' in the property. In this regard one must differentiate between a trust established for a perfunctory purpose only, and one established with authority in the *trustee* to alienate the estate and vest title." And, also, "In arriving at a solution of abstract questions and in following the devious courses taken by the title to property involved in various transactions, we, however, sometimes lose sight of the full intention of the parties to these transactions. The primary rule in the construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the creator."

The cases above referred to involve the rights of creditors or third parties. Under such circumstances these cases may be taken as holding that where a trust is created for a limited period or a limited purpose, the grantor retains an interest in the realty conveyed, that a contrary rule may prevail where land is conveyed in trust for the purpose of subdivision and sale, and that in such a case the absence of a power of revocation and of any provision for returning the land to the grantor, is sufficient evidence of an intention to change the interest of a beneficiary from one in real property to one in personal property.

A somewhat different question is here presented where land was conveyed in trust not only as security for a past debt and for contemplated advances in aid of a subdivision scheme, but also to the end that several properties might be owned, improved, subdivided and disposed of as one, and where the controversy is between the trustors and the trustee and the rights and interests of third parties are not involved.

This trust agreement specifically provides that the interest of each beneficiary is personal property and that no such beneficiary has any right, title or interest in or to the property conveyed. While this seems to have been intended to cover the entire interest of each beneficiary the appellants contend that it did not cover their interest as mortgagors since the conveyance in trust was made partly as security for debts. While the trust agreement recites that

the conveyances were made primarily as security for debts and advances and for the further purpose of holding, operating, leasing, selling and conveying the properties, the appellants largely ignore the latter purpose in contending that the trust agreement should be interpreted as creating an equitable mortgage. The trust agreement provides for the making of improvements in furtherance of the purpose of subdivision and sale and contemplates advancements from the respondent, apparently for that purpose. Such advancements were made until the debt amounted to some $263,000. It is fully apparent that this was quite different from the ordinary conveyance given to secure a debt. (Renton *v.* Gibson, 148 Cal. 650; Cardoza *v.* White, 219 Cal. 474). In the latter case the court said: "But the authorities cited * * * go no further than to state the familiar proposition that a deed made *solely* for security will, when attacked by the grantor, be construed as a mortgage in accordance with the real intent of the parties." The improvement and sale of this land and the securing of advancements to aid therein was one of the main purposes, if not the main purpose, of this trust. An existing contract with a subdivider was recognized and it provided that other such contracts might be made. The only material difference between this trust agreement and those considered in the subdivision cases above noted is that it was here provided that the trust might be terminated after all debts had been paid and all subdivision contracts had been ended, in which event any unsold land would be returned to the beneficiaries, and not to the grantors. In a somewhat similar situation, even where the rights of third parties were involved, the court, in Smith *v.* Bank of America etc. Assn., *supra,* held that the beneficial interest of the trustors was personal property and said: "It is made quite clear from the trust agreement itself that during the life of the trust the entire title and estate is in the trustee."

Not only are the rights of third parties not involved here but the parties have clearly expressed the intention that the trustors shall have no right, title or interest in the property conveyed and that their interests under the trust shall be considered as personal property. In Smith *v.* Bank of America etc. Assn., *supra,* it is said that such language

is indicative of the intention of the parties and that "the intention is the criterion." In Faries *v.* Title Inc. etc. Co., 15 Cal. App. (2d) 350, this court said: "The declaration of trust contained the provision that the interest of the beneficiaries should be personal and not real property. It is probably true that this affected the conversion of an interest in real estate into personal property." In Bank of America *v.* Sparr R. Corp., *supra*, in holding that the beneficial interests in the trust were personal property the court, after pointing out that the language of the trust agreement and of the assignments of beneficial interests disclosed such an intention, said: "If the intention of the parties was to treat the beneficial interests as a pledge in the nature of personal property, then and in that event the intention then and there expressed prevails throughout the entire transaction."

That the expressed intention was the real intention of the parties seems more probable since different lands were conveyed to the trust by three of the trustors with the purpose of holding and disposing of them as a unit, and there was not only a fourth beneficiary but the interests of the beneficiaries differed materially from their respective interests in the lands conveyed. In no event would any beneficiary receive back exactly what he had conveyed with deductions for what had been sold.

The subsequent acts of the parties throw further light upon their intention and confirm what seems to have been rather clearly expressed in the trust agreement. To secure notes subsequently given in pursuance of the general plan, the trustors each pledged to the respondent all their interest both in the trust and in the proceeds thereof. They had each agreed that their entire interest in the trust and the corpus thereof was personal property, and they again pledged these interests as personal property. This subsequent pledge confirms their previous expressed intention that, at least as between themselves, their interests were to be treated as personal property. The subsequent assignments and pledges referred not only to their interest in the trust but made a separate reference to their interest in the proceeds and avails thereof. All of their pledges referred to their entire interests in the trust and it is a mere

technicality and a play on words to argue that they intended, by the language thus used, to cover merely their interests in the proceeds and to omit and exclude any equitable interest in the corpus of the trust estate. Under these circumstances and as between the parties themselves, we think the court was justified in finding that the appellants' entire interest in this trust and in the property constituting the corpus thereof was personal property. We find nothing in the cases or statutes cited which would prevent that conclusion under the facts here found.

Aside from the meaning of the provisions of the trust agreement and of the pledges of the beneficial interests therein the question of whether the appellants still possess an interest in the real property is affected by further considerations, including the effect of the judgment rendered in the Los Angeles County action and of the subsequent quitclaim executed by them.

The appellants contend that that judgment is not material here, although all parties here were parties to that action. It is argued that the only issue here is as to the right of possession of the land and that this issue was in no way involved in the former action. However, the question of title is involved here as any rights of the appellants must depend upon whether or not they still have an interest in this land which has not been foreclosed. Whether they retained such an interest depends not only upon a construction of the trust agreement, but upon a construction of the pledge of their beneficial interest therein. In Price *v.* Sixth District Agricultural Assn., 201 Cal. 502, the court quotes with approval from Freeman on Judgments as follows: "If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action it is *res adjudicata* when it comes again in issue in another action between the same parties, though the immediate subject matter of the two actions be different." The court then said:

> "In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto.

This rule has been aptly stated as follows: 'it is important to note in this connection, however, that even tho the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppal so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made' (Freeman on Judgments. 5th Ed., sec. 677, p. 1432). To the same effect see *Sullivan* v. *Triunfo Gold etc. Min. Co.*, 39 Cal. 459. Numerous California cases may be found where this rule has been applied.

"This principle also operates to demand of a defendant that all of his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them."

Instead of proceeding with an ordinary sale of the pledged property the respondent brought the former action. The pledge agreement had referred not merely to the interest of the trustors and pledgers in the proceeds of the trust, but also to all their right, title and interest in and to the trust itself. The complaint in the former action alleged that the entire interest of the pledgors under the trust agreement had been pledged with the right to sell the same as personal property. Among other things, it was prayed that each of the defendants be foreclosed of all his right, interest, claim, lien and/or equity in and to the beneficial interest in this trust, "together with the property therein described." The appellants were thus advised that a foreclosure of any interest or equity they might have in the property was demanded. They failed to answer and the court found that their entire beneficial interest was pledged as personal property. That the appellants fully understood that the purpose of the other action was to foreclose any possible interest they might have in the real property in question is shown by an affidavit filed by the appellant S. B. Wright in the Los Angeles action in connection with a motion to reopen the same. In this affidavit, he said: "Affiant verily states that the object and purpose of said action

was to foreclose affiant's interest and the interest of the other named defendants of all their right, title and interest in said real property known as Wrightwood." There was presented in that action the question of whether the entire beneficial interest of the appellants in this trust was or was not personal property and pledged as such, and it was further sought to foreclose all of the appellants' interest in this land. The appellants, at least, had no doubt as to what was meant by the reference in the complaint to their entire beneficial interest. If they considered that they had an interest or equity in the land which had not been pledged they then had an opportunity to present such a claim. Under established rules they should be estopped from again litigating that question, and the trial court so found.

Subsequently, the appellants dismissed their appeal in the former action and quitclaimed the land in question to the respondent. At the trial of the present action the appellants contended that this quitclaim was obtained from them by fraudulent representations made by the respondent, that they did not know what was in the instrument, and that they had no independent advice. The court found against them on the issues of fraud on ample evidence, which included evidence that they had read the document and had discussed it with three attorneys who then represented them and who had advised them to sign it. They now contend that the quitclaim was void because they were mortgagors under an equitable mortgage and because, as they say, the respondent failed to prove that it paid, as consideration for the quitclaim, the full value of their equity in the property. The quitclaim was signed on April 30, 1935, about a year after judgment was rendered in the Los Angeles County action. Mrs. Wright testified that she considered the property to have been then worth $500,000, and appellants state that this testimony was not denied. It does appear, however, that this testimony came in incidentally and that the case was tried on the theory that the quitclaim was void, not because of the inadequate consideration, but because it was obtained by fraud and the appellants were deceived as to its contents. On April 10, 1934, the appellant S. B. Wright wrote to the respondent, "Perhaps I should say here that it has been a great relief

to me that the Bank brought this action as I believe it was absolutely essential that they should do so to protect itself and all other parties in interest. The Bank has always extended to us every possible accommodation consistent with good banking and for which, of course, we are duly appreciative." More than a year later the property was quitclaimed to the respondent. The quitclaim agreement recites a consideration of $300, which was paid, and "other good and valuable consideration." While we are not informed exactly as to what that other consideration was, it does appear that the respondent released the appellants from the payment of the balance of $4500 on the judgment on the notes, and also executed a contract to a third person which the appellants were anxious to obtain.

In support of their contention that a fiduciary relationship existed between the parties at the time the quitclaim was signed and that the burden rested upon the respondent to affirmatively prove that it had paid for the mortgagor's equity "what it was worth," the appellants rely upon Bradbury *v.* Davenport, 114 Cal. 593; Clarke *v.* Fast, 128 Cal. 422; and Collette *v.* Sarrasin, 69 Cal. App. 114. In the *Bradbury* case, the complaint alleged that a deed had been placed in escrow to be delivered if a mortgage was not paid within a certain time and it was sought to have the deed construed as an equitable mortgage. A demurrer to the complaint was sustained and on appeal the judgment was reversed on the ground that a sufficient cause of action had been alleged. In a subsequent appeal (Bradbury *v.* Davenport, 120 Cal. 152), the validity of the deed was sustained upon the findings. In that case, the court quoted from Watson *v.* Edwards, 105 Cal. 70 as follows: "A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses, and with their eyes open, could not make such a contract." Clarke *v.* Fast involved the transfer of an insurance policy for $5000 in payment of a debt of $200 under circumstances which were plainly inequitable. In Collette *v.* Sarrasin, supra, the court assumed that in the case of a

deed made by a mortgagor to his mortgagee it must be shown that the conduct of the mortgagee was fair and that he paid what the property was worth, but refused to go into that phase of the case because it held that the deed there in question was a deed of gift.

While it may be admitted that an adequate consideration must be paid in such a case, what is an adequate consideration must depend upon the particular circumstances involved, as is indicated in some of the other cases in this state. In De Martin *v.* Phelan, 115 Cal. 538, the complaint alleged that land worth $390,375 was mortgaged for $196,000, that plaintiff's equity was worth at least $45,500, that the defendant took advantage of the plaintiff's necessities and offered her $19,000 for her equity of redemption, which she took but would not have taken had he not concealed from her the fact that he was willing to pay her up to $45,500 if he could not procure the conveyance for less. The court held that the complaint did not state a cause of action and held that there was no fiduciary relationship between the parties at that time, saying the defendant had obtained a decree of foreclosure and had postponed the sale pending the negotiations. The court pointed out that the plaintiff was fully aware of the situation and knew all of the essential facts. In Heney *v.* Heney, 80 Cal. App. 301, it is said: "The rule adhered to in this state is, however, that 'the relation between a mortgagee and mortgagor is not fiduciary'." In Graves *v.* Arizona Central Bank, 205 Cal. 715, the respondent had loaned to one Squier $1500 and taken as security an assignment of a contract under which Squier was buying certain land at a purchase price of $12,000 and upon which $4,000 had been paid. Squier later orally agreed that the assignment should be absolute and the respondent paid $2,000 on the original contract. In speaking of the consideration for the oral transfer the court noted that the respondent had canceled Squier's debt to him, had assumed the further payments on the contract and had prejudiced himself by making such payments, and then said: "Sufficient facts therefore appear to estop said Squier from asserting any title to said property, equitable or otherwise, as against the claim of respondent." In Tetenman *v.* Epstein, 66 Cal. App. 745, the court, after

stating that the findings negatived the idea that the deed was executed as a result of fraud and that it was expressly found that the parties at the time of the transfer believed the property to be worth no more than the debt, said:

> "The conclusion is unavoidable from these findings that when the deed was executed the interveners were satisfied to secure the cancellation of their debt in that way. Such being the facts the underlying reason for the rule favoring the mortgagor's right to redeem has no application if the mortgagor contracted freely; no substantial argument is apparent for limiting his power to contract and relieve himself of a debt through the transfer of a property right.
>
> "But aside from these considerations it will be noted that the actions cited by respondent, and other cases in which courts of equity have shown a willingness to set aside deeds made by mortgagors conveying their equities of redemption to mortgagees have been suits to rescind or to redeem; proceedings in which the mortgagor, though tardy, has either come forward and tendered the amount necessary for redemption, or has sought rescission on the ground of fraud or undue influence or advantage taken by the mortgagee over the mortgagor."

Assuming, but not holding, that a relationship of mortgagor and mortgagee existed here, the rule relied upon by the appellants requires no more than that the transaction by which the mortgagor conveys any remaining equity he may have in the property to the mortgagee shall be fair and upon a consideration which is adequate under the circumstances. What is an adequate consideration must depend upon the facts in each case and is a question of fact for the trial court. The respondent here gave a very substantial consideration for the quitclaim, including $300.00 in cash, the release of $4500.00 further indebtedness, and the execution of a contract which the appellants desired. While the appellants may, in looking back, have considered the property worth $500,000 at the time in question, the general circumstances justified the court in concluding otherwise. With full op-

portunity to sell the property the appellants had been unable to pay the debt while the respondent carried the loan for ten years. The quitclaim was given more than a year after judgment was entered in the other action. When the cash called for by that agreement was paid on May 14, 1935, after the appeal had been dismissed the respondent told Mr. Wright that it would sell the property to him, or to anyone, for what it had in it. This action was begun nineteen months later, and there is no evidence that in the meantime, or since, the appellants, or any one in their behalf, have ever offered to pay that amount and take back the property. Under the circumstances shown by the evidence we are unable to see that the court erred in refusing to declare the quitclaim void for lack of an adequate consideration.

We think the court correctly held that the appellants are estopped from asserting any title to the property, equitable or otherwise, as against the claim of the respondent. It is noticeable that they have never offered to pay the amount of the debt or the amount paid by the respondent at the sale of the pledged property. While the appellants assert that such an offer on their part is not required in this action, being one merely for the possession of the property, the facts remain that the question of the title to the land was actually involved, that the respondent was in possession under a conveyance absolute upon its face, and that in order to recover possession the appellants necessarily sought to obtain equitable relief by having the quitclaim set aside. To secure such relief it was incumbent upon them to comply with and bring themselves within the rules of equity.

BARNARD, *P. J.*

We concur:
MARKS, *J.*
GRIFFIN, *J.*

IN THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA.

Clerk's Certificate.

I, M. C. Van Allen, Clerk of the District Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed documents are true and correct copies of the originals filed under Section 1 of Rule 12 with regard to jurisdiction on appeal to the United States Supreme Court, as shown by the records on file in case No. 2445, Wright, etc. vs. Security-First National Bank of Los Angeles, etc.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court of Appeal, Fourth Appellate District, this 1st day of July, 1940.

M. C. VAN ALLEN,
Clerk.

No. 240. WRIGHT *v.* SECURITY-FIRST NATIONAL BANK OF LOS ANGELES. Appeal from the District Court of Appeal, 4th Appellate District, of California. October 14, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) of the Judicial Code (43 Stat. 936, 938), certiorari is denied. The motion for leave to proceed further *in forma pauperis* is also denied. *Mr. Morris Lavine* for appellant. *Mr. James E. Shelton* for appellee. Reported below: 35 Cal. App. 2d 264; 95 P. 2d 194.